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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

—v.—

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 16, 1965.

Citations to Opinions Below

The opinion of the District Court, dated June 3, 1963 is reported in 35 F.R.D. 196, and is printed in Appendix B hereto, *infra*, pp. 29a-31a.

The opinion of the District Court, dated December 5, 1963, is not officially reported, but is unofficially reported in 8 CCH Avi. 18,023, and is printed in Appendix B hereto, *infra*, pp. 22a-29a.

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pp. 7a-20a, is reported in 341 F. 2d 851.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 16, 1965. R. 108a, p. 20a, *infra*. No petition for rehearing was filed in the Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

1. Is subject matter jurisdiction of United States District Courts in diversity cases limited by the provisions of a Treaty of the United States known as the Warsaw Convention?[1]

2. Has an air carrier accepted a person as a passenger without a passenger ticket having been delivered, within the meaning of Article 3 (2) of the Warsaw Convention, where the carrier's employee delivers a ticket to the passenger on the aircraft while it is parked at the ramp and prior to the time when the aircraft commences the flight?

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[1] Officially, Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, concluded at Warsaw, October 12, 1929. 49 Stat. 3000; T.S. 876.

Treaty Involved

The Treaty provisions involved are Articles 1, 3, 28 and 32 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, concluded at Warsaw, October 12, 1929, 49 *Stat.* Pt. 2, p. 3,000; T. S. 876. This Treaty is commonly referred to as the Warsaw Convention. The official text of the Warsaw Convention is in French. The full text of these Articles in French, and the English translations thereof adopted by the Department of State and forwarded to the United States Senate with the official text at the time of ratification, are printed in Appendix A, *infra,* pp. 1a to 6a.

Statement

On September 9, 1958, an aircraft owned and operated by petitioner, The Flying Tiger Line, Inc., crashed on a mountain near Tokyo, Japan (R, 58a-59a). The flight originated at Travis Air Force Base, California, and was to terminate at Tachikawa Air Force Base, Tokyo, Japan (R. 58a).

All of the occupants of the aircraft were killed, including the crew and the two passengers, one of whom was respondents' decedent, Frederic Thorn Mertens (R. 58a).

Prior to the departure of the flight from Travis Air Force Base, California, and while the aircraft was parked at the ramp, an employee of petitioner delivered a passenger ticket to respondents' decedent on board the aircraft (Appendix B, *infra,* p. 17a). The passenger ticket listed Travis Air Force Base in California as the place of departure, and either Tokyo or Tachikawa Air Force Base, both in Japan, as the place of destination (R. 43a, 63a).

This action was instituted to recover damages allegedly sustained by respondents as a result of the death of their decedent. Prior to the trial, petitioner moved to dismiss for lack of subject matter jurisdiction, asserting that the District Court sitting in New York lacked jurisdiction of this action because New York was none of the places specified in Article 28 of the Warsaw Convention where this action must be brought. Article 28 of the Warsaw Convention provides that an action for damages, in the case of death of a passenger, must be brought either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract of transportation has been made, or before the court at the place of destination. The domicile of petitioner is Delaware, the State of incorporation; the principal place of business of petitioner is Burbank, California; the contract of transportation was made at Travis Air Force Base, California; and the place of destination specified in the contract of transportation is in Japan.

The District Court denied the motion of petitioner to dismiss for lack of subject matter jurisdiction in an opinion dated June 3, 1963, which is printed in Appendix B, *infra*, pp. 29a-31a. The Court followed a prior decision of the same Court in which a similar motion was denied upon a holding that Article 28 of the Warsaw Convention was not intended to deal with questions of technical subject matter jurisdiction within the framework of the federal judicial system of the United States, or to impinge upon the jurisdiction conferred by Congress upon the federal courts. *Spencer* v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S. D. N. Y. 1962).

At the trial, respondents sought to avoid the limitation of liability in the Warsaw Convention by contending,

inter alia, that no passenger ticket was ever delivered to respondents' decedent, and, alternatively, if there was, that it was not a timely delivery within the meaning of Article 3 (2) of the Warsaw Convention. The trial court submitted the issue of whether any ticket was delivered to the jury, and the jury returned a verdict on this question in favor of petitioner (Appendix B, *infra*, p. 28a). The trial court ruled as a matter of law that the delivery of the ticket to respondents' decedent on board the aircraft prior to the commencement of the flight was an effectual and appropriate delivery within the meaning of Article 3 (2) of the Warsaw Convention (R. 64a).

The Circuit Court of Appeals affirmed the denial of petitioner's motion to dismiss for lack of subject matter jurisdiction, holding that the word "place" used in Article 28 of the Warsaw Convention means entire nation, and not a jurisdiction within a nation. The Court below reasoned that although the Warsaw Convention deals with private international law, it is an agreement between "nation—states" and therefore the word "place" as used in Article 28 means "nation—state", rather than a particular locality or jurisdiction within a nation—state. Since the principal place of business and domicile of petitioner, and also the place of the making of the contract of transportation, were in the United States of America, although admittedly not at New York, the Circuit Court of Appeals held this to be sufficient basis for affirming the denial of petitioner's motion to dismiss for lack of subject matter jurisdiction.

The Circuit Court of Appeals also held, as a matter of law, that the delivery of the ticket to respondents' decedent was not adequate, and accordingly, that the limitation of liability in the Warsaw Convention was unavailable to petitioner. The Court below reasoned that the purpose of requiring that a ticket be delivered to a passenger

was to put the passenger on notice of the limitation of the carrier's liability under the Warsaw Convention. Hence, so the Court below rationalized, the ticket must be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability, such as deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance for the flight. The Court then held that the ticket delivery in this case was inadequate as a matter of law because, under the circumstances, the delivery did not furnish decedent with this "reasonable opportunity."

Reasons for Granting the Writ

The questions of federal law presented are of national importance, and their resolution by this Court is in the public interest. The construction of Article 28 of the Warsaw Convention by lower courts to date has resulted only in conflicting decisions as to whether the effect of Article 28 is to restrict the subject matter jurisdiction of United States District Courts in diversity cases. Further, the decision below has challenged the validity of the tickets and ticketing procedures presently in use on virtually every scheduled international flight.

Neither of these questions has ever been passed upon by this Court. Since both questions involve the proper construction of a Treaty of the United States, to which some 80 other nations are parties, they should be resolved at this time by this Court in the interests not only of national uniformity in construction, but of international uniformity, which is the very purpose of the Treaty.

1. The Court below has construed Article 28 of the Warsaw Convention as referring only to "nations", and

not jurisdictions within nations, and has concluded that if any of the places specified is located in the United States, then an action for damages may be brought in any Court in the United States where jurisdiction can otherwise be obtained.

Article 28 of the Warsaw Convention requires that an action:

> "must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination". 49 *Stat.* 3020.

Article 28 is not the only Article in the Convention where the term "place" is used. Article 1, paragraph (2), uses the same term in defining the expression "international transportation" as used in the Convention. "Place" of departure, "place" of destination, and agreed stopping "place" are referred to throughout Article 1, paragraph (2) as being places "within" the territory of a Party to the Convention or "within" the territory of some other nation. 49 *Stat.* 3014. The "places" mentioned in Article 28 are used in the same context, *i.e.*, places *within* nations. This is borne out by the plain meaning of the language of Article 28. The first prerequisite to jurisdiction of an action for damages is that the action be brought in the territory of one of the Parties to the Convention, and then before a court having jurisdiction at any one of the four places specified in such territory.

Several Courts have regarded the four places specified in Article 28 as places within the territory of a Party to the Convention. See *Nudo* v. *Societe Anonyme Belge*

D'Exploitation de la Navigation Aerienne, 207 F. Supp. 191 (E. D. Pa. 1962); *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Av. R. 651 (N. D. Ill. 1961); *Scarf* v. *Trans World Airlines, Inc.*, 4 CCH Avi. 17,795 (S. D. N. Y. 1955), *appeal dismissed*, 233 F. 2d 176 (2d Cir. 1956); *Galli* v. *Re-Al Brazilian International Airlines*, 29 Misc. 2d 499, 211 N. Y. S. 2d 208 (Sup. Ct. 1961); *Woolf* v. *Aerovias Guest, S.A.*, 1954 U. S. Av. R. 399 (N. Y. Munic. Ct. 1954).

Other Courts, as did the Court below, have regarded "place" in Article 28 as referring only to nations rather than places within nations. *Pitman* v. *Pan American World Airways, Inc.*, 223 F. Supp. 887 (E. D. Pa. 1963); *Downs* v. *Compagnie Nationale Air France*, 8 CCH Avi. 18,129 (S. D. N. Y. 1963); *Spencer* v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S. D. N. Y. 1962); *Pardonnet* v. *The Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N. D. Ill. 1964); *Eck* v. *United Arab Airlines, Inc.*, 15 N. Y. 2d 53 (1964).

The effect of Article 28 of the Warsaw Convention on diversity jurisdiction of United States District Courts has been further confused by conflicting decisions as to whether Article 28 refers to subject matter jurisdiction or merely to venue. *Pardonnet* v. *The Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N. D. Ill. 1964), *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E. D. Pa. 1962), and *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Av. R. 651 (N. D. Ill. 1961), all have treated Article 28 as relating to subject matter jurisdiction. The Queen's Bench Division of the High Court of Justice of the United Kingdom similarly has treated Article 28 as a subject matter jurisdiction provision. See *Rotterdamsche Bank N.V.* v. *British Overseas Airways Corp.*, 1953 U. S. Av. R. 163, (1953) 1 Lloyd's List Law Reports 154.

The following cases, on the other hand, have treated Article 28 as merely a venue provision and not as relating to subject matter jurisdiction: *Downs* v. *Compagnie Nationale Air France,* 8 CCH Avi. 18,129 (S. D. N. Y. 1963); *Spencer* v. *Northwest Orient Airlines, Inc.,* 201 F. Supp. 504 (S. D. N. Y. 1962); *Brown* v. *Compagnie Nationale Air France,* 8 CCH Avi. 17,272 (S. D. N. Y. 1962); *Mason* v. *British Overseas Airways Corp.,* 1961 U. S. Av. R. 617 (S. D. N. Y. 1956).

The Court below expressly declined to pass on the question of whether Article 28 relates to subject matter jurisdiction or merely to venue. However, the Court did recognize that plaintiff's choice of forum under Article 28

> "is restricted to the High Contracting Parties and it is further restricted to a High Contracting Party that is one of the enumerated places, thereby disqualifying, for example, the forums in the High Contracting Party where the accident fortuitously occurred . . . or those in the High Contracting Party where the passenger was domiciled, or those in other High Contracting Parties that had absolutely no contact with the flight, carrier, or passenger." 341 F. 2d at 855.

Prior to the decision by the Court below, a District Court in the Southern District of New York had held that one of the places in Article 28 must be in the United States in order to support subject matter jurisdiction in any District Court. Since none of the places in that case was in the United States, the motion of defendant to dismiss for lack of jurisdiction was granted. *Khan* v. *Compagnie Nationale Air France,* 9 CCH Avi. 17,107 (S. D. N. Y. 1964). Another District Judge in the same Court has held, since the decision by the Court below, that Article 28 is

merely a venue provision, and even where none of the places in Article 28 is in the United States, the District Court nevertheless has subject matter jurisdiction. *DiBiase* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, Civil Action No. 63-1736 (S. D. N. Y., May 10, 1965). The memorandum opinion is printed in Appendix C hereto, *infra*, p. 32a).

It is believed that the better reasoning is that Article 28 relates to subject matter jurisdiction, and therefore limits the jurisdiction of Federal District Courts in diversity cases involving the Warsaw Convention. Article 32 of the Convention would appear to require the conclusion that Article 28 relates to subject matter jurisdiction. Article 32 declares null and void any agreement between a passenger and a carrier which purports to alter the rules of the Convention as to *jurisdiction*. 49 *Stat.* 3021. Furthermore, the minutes of the meetings of CITEJA at which the Warsaw Convention was drafted disclose that the delegates, when discussing the drafting of Article 28, were thinking in terms of jurisdiction. See *Proceedings of the Second International Conference of Private Air Law at Warsaw*, October 4-12, 1929, ICAO Doc. 7838, pp. 77, 81, 82 (R. 53a-54a).

Clearly, the question presented by the decision below as to whether Article 28 of the Warsaw Convention limits subject matter jurisdiction of United States District Courts in diversity cases is of substantial and increasing importance. The decision of the Court below on this question is inconsistent with the plain language of the Warsaw Convention, and if allowed to stand, will only serve to further compound the state of confusion which already exists in the District Courts as to the meaning and effect of Article 28 of the Warsaw Convention. Involving as it does a matter of federal jurisdiction, the question should be resolved by this Court at this time in order that lower federal courts will be properly guided in the future as this

question arises again and again. Settlement of the meaning of Article 28 of the Warsaw Convention is plainly in the public interest, because the application of Article 28 will arise in almost every action governed by the Warsaw Convention. With the ever-increasing volume of international transportation by air, the frequency with which the courts will be confronted with this question is also bound to increase.

2. The decision of the Court below is believed to be erroneous with respect to its holding that the delivery of the ticket to respondents' decedent was inadequate as a matter of law. The requirement of Article 3 (2) of the Warsaw Convention that a ticket be delivered to a passenger was assumed by the Court below to be in effect a requirement that the passenger be given timely notice of the limitations imposed upon the carrier's liability by law. The Warsaw Convention does not require the passenger ticket to set forth the amount of the carrier's limitations of liability, but merely to state that the transportation is subject to the rules relating to liability established by the Convention. From any practical standpoint, neither the customary delivery of the ticket at the departure counter nor delivery at the aircraft before commencing departure procedures would advise the passenger of what the limitations of liability are in monetary sums.

The application of the limitations of liability contained in the Warsaw Convention does not depend upon either contractual agreement of the parties, *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S. D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. 2d 880 (1949), nor upon notification to the passenger of the amount of the limitations of liability set forth in the Warsaw Convention, *Seth* v.

British Overseas Airways Corp., 329 F. 2d 302 (1st Cir. 1964), *cert. denied*, 13 L. Ed. 2d 61 (1964).

These limitations upon the carrier's liability are not imposed by the carrier but by the Treaty itself. The purpose of the requirement that a ticket be delivered is to finalize and provide the passenger with proof of the contract of transportation between the passenger and the carrier. None of the conditions printed on the back of the ticket issued to respondents' decedent purport to alter in any way the provisions of, and limitations of liability imposed by, the Warsaw Convention, where the transportation is subject to the Convention.

Moreover, the decision below is based upon an assumption that the statement on the back of the ticket that the carriage is subject to the rules relating to liability established by the Warsaw Convention was virtually unnoticeable and unreadable. Since the notation of the conditions on the ticket issued to respondents' decedent was in the same form and size as that used by virtually every scheduled international air carrier today, a serious question has been raised by the decision below as to the validity of any ticket in use today by international carriers as an effective compliance with the requirements of Article 3 (2) of the Warsaw Convention. The decision below, in holding that "the ticket must be delivered to the passenger in a manner as to afford him a reasonable opportunity to protect himself against the limitation of liability" imposed by law (as distinguished from purely contractual limitations which might be sought to be imposed by a carrier in printed conditions on the ticket) would require that the conditions be printed in a language the passenger could read, if he were literate. This interpretation of Article 3 (2) is completely at variance with the clear language of the Convention, and in conflict with *Seth, supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUSTIN P. MAGNER

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GEORGE N. TOMPKINS, JR.
Counsel for petitioner

May 14, 1965

APPENDIX

APPENDIX A

Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000; T. S. 876.

Article 1.

"(1) La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transports aériens.

(2) Est qualifié 'transport international', au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

(3) Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son caractère interna-

tional par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante."

Article 3.

"(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse du ou des transporteurs;

e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été delivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité."

Article 28

"(1) L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes

Appendix A

Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

(2) La procédure sera réglée par la loi du tribunal saisi."

Article 32

"(1) Sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente Convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28 alinéa 1."

Article 1

"(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or

a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party."

Article 3

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the

alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Article 28

"(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted."

Article 32

"Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down

by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 141—September Term, 1964.

(Argued October 27, 1964 Decided February 16, 1965.)

Docket No. 28690.

FREDERIC T. MERTENS, SR., individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Plaintiffs-Appellants-Appellees,

—against—

THE FLYING TIGER LINE, INC.,

Defendant-Appellee-Appellant.

Before:

LUMBARD, *Chief Judge,*
HAYS and MARSHALL, *Circuit Judges.*

Appeal and cross-appeal from a judgment of the District Court for the Southern District of New York entered after Inzer B. Wyatt, *Judge,* denied defendant's motion to dismiss for lack of subject matter jurisdiction, and after a trial was held before Edmund L. Palmieri, *Judge,* and a jury. Denial of motion to dismiss, affirmed; judgment awarding plaintiffs $8,291.87 vacated and case remanded for a new trial on the issue of damages.

Appendix B

CLARENCE FRIED, New York, N. Y. (Hawkins, Delafield & Wood, on the brief) (Ronald Charles Wolf, of counsel), *for Plaintiffs-Appellants-Appellees.*

AUSTIN P. MAGNER, New York, N. Y. (Condon & Forsyth, on the brief) (George N. Tompkins, Jr., of counsel), *for Defendant-Appellee-Appellant.*

MARSHALL, *Circuit Judge*:

An action was commenced in the Southern District of New York to recover damages resulting from a death caused by an airplane accident in Japan. Decedent's parents brought the action in their individual capacity, and the father also acted in a representative capacity as the administrator appointed under New Jersey Law. The owner and operator of the airplane, a Delaware corporation doing business in New York, Flying Tiger Line, Inc., was served in New York and made defendant. Jurisdiction was based on diversity of citizenship, 28 U. S. C. § 1332.

At the outset we are faced with a question whether the Warsaw Convention, 49 Stat. 3000, is applicable. There is no doubt that the airflight in question was "international." The plane departed from Travis Air Force Base, San Francisco, California and the point of destination was Tachikawa Air Force Base, Tokyo, Japan, and both Japan and the United States are parties to the Convention. Instead, doubts as to the applicability of the Convention arise from the fact that when President Franklin D. Roosevelt, with the advice and consent of the Senate, adhered to the Warsaw Convention, he did so subject to the reservation,

provided for in the Additional Protocol, 49 Stat. 3025, that the Warsaw Convention shall not apply to international transportation that may be "performed by the United States," *id.* at 3013. It is urged that because defendant's plane was regularly and in this instance chartered by the United States for the transportation of military cargo and personnel to military destinations this international transportation was "performed by the United States," thereby making the Convention inapplicable. We are of the opinion, however, that the transportation was performed by the Flying Tiger Line, the owner and operator of the aircraft, and that it was performed *for* the United States, not *by* the United States. See *Warren* v. *The Flying Tiger Line, Inc.*, 234 F. Supp. 223, 231 (S. D. Cal. 1964). The regularity of the chartering relationship between the United States and defendant gives us some cause to look upon this analytic distinction with some circumspection. But these doubts are dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955. See generally, International Conference of Private Air Law, The Hague, September 1955, International Civil Aviation Organization, Doc. 7686-LC/140.

A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to read: "The Convention shall not apply to . . . [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities." The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment

thought so. The proposed amendment was rejected by the Conference, though not because the representatives thought this exclusion was already provided for in Article 2. Instead, the representatives thought it more appropriate to let each individual Contracting Party, if it so chose, to make the Convention inapplicable to charter flights by the military. Accordingly, a nation adhering to the Protocol was granted the legal power to declare that the Convention shall not apply to military charter flights on aircraft registered in that country, Article XXVI, Hague Protocol (Protocol Amending Convention for the Unification of Certain Rules to International Carriage by Air, The Hague, September 28, 1955), S. Doc. No. Executive H, 86th Cong., 1st Sess. The United States has not yet ratified the Hague Protocol and obviously has not made the requisite declaration under that Protocol. The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit.

The determination that the Warsaw Convention is applicable is not the end of our problems. The significance of this fact remains to be decided. The most controverted issues in this litigation involve the effect of the Convention on plaintiffs' choice of forum (Article 28(1)) and the limitation on defendant's liability (Articles 3(2), 22(1) and 25).

I. Choice of Forum

Article 28(1) of the Warsaw Convention provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of

business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

Defendant argues that Article 28(1) establishes four "places" *within* the territory of a High Contracting Party where an action for damages can be brought;[1] and that a court located in another "place" within the territory of a High Contracting Party is without subject matter jurisdiction to maintain an action arising out of an airflight covered by the Convention, notwithstanding the internal jurisdictional laws. Defendant moved to dismiss for lack of subject matter jurisdiction on the ground that the District Court for the Southern District of New York was not located in a "place" that satisfied the criteria of Article 28(1). The principal place of business of the carrier was Burbank, California; the alleged contract of transportation was made at Travis Air Force Base at San Francisco, California; the place of destination was a point in Japan; and the domicile of the carrier was claimed to be the state of incorporation, Delaware.

However, we read Article 28(1) quite differently. The "places" specified refer to the High Contracting Parties, not to areas within a particular High Contracting Party. An action may be brought, at the option of the plaintiff, in the territory of a High Contracting Party, if the domi-

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[1] Authority for defendant's interpretation could be found in the following cases, none of which we find persuasive: e.g., *Scarf* v. *Trans World Airlines, Inc.*, 4 CCH Aviation Cases ¶17,795 (S. D. N. Y. 1955), *appeal dismissed*, 233 F. 2d 176 (2 Cir. 1956); *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E. D. Pa. 1962); *Winsor* v. *United Air Lines, Inc.*, 153 F. Supp. 244 (E. D. N. Y. 1957); *Galli* v. *Re-Al Brazilian International Airlines*, 29 Misc. 2d 499, 211 N. Y. S. 2d 208 (Sup. Ct. 1961); *Woolf* v. *Aerovias Guest, S.A.*, 1954 U. S. Av. R. 399 (N. Y. Munic. Ct. 1954).

cile of the carrier, the principal place of business of the carrier, the place of business at which the contract was made, or the place of destination is within that country. Plaintiff's choice of forum within that country is governed by the internal law, with all its intricacies and complexities, not by the Warsaw Convention. *Pardonnet* v. *The Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N. D. Ill. 1964); *Pitman* v. *Pan American World Airways, Inc.*, 223 F. Supp. 887 (E. D. Pa. 1963); *Spencer* v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S. D. N. Y. 1962); see McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. Air L. & Com. 205 (1963); Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 McGill L. J. 352 (1963).

The basic unit of international law is the nation-state and it is fair to assume, absent clear indications to the contrary, that Article 28(1), was written with reference to nation-states, not to areas and subdivisions of nation-states. The minutes of negotiations surrounding the drafting of the Treaty do not reveal the slightest concern with the problems relating to choice of forum within a nation-state, and in fact the discussion on Article 28(1) contains some indications that the drafters merely attempted to control choice of forum at the level of nation-states. See Minutes of II Conference Internationale de Droit Prive Aerien, 4-12 Octobre 1929, Varsovie, ICAO Doc. 7838; Calkins, 26 J. Air L. & Com. 217, 229 (1959). The United States Senate certainly did not indicate that it understood that the Warsaw Convention would have any impact upon the rules governing the choice of forum within the federal system, or among the various states, see 78 Cong. Rec. 11577 (1934).

An analysis of the text leads us to the same conclusion. Under our interpretation the plaintiff's choice of forum is

restricted to one of the High Contracting Parties and it is further restricted to a High Contracting Party that is one of the enumerated places, thereby disqualifying, for example, the forums in the High Contracting Party where the accident fortuitously occurred, see Calkins *supra*, p. 231, or those in the High Contracting Party where the passenger was domiciled, or those in other High Contracting Parties that had absolutely no contact with the flight, carrier, or passenger. Under defendant's interpretation it would be difficult to determine the geographical bounds of the "places" referred to: would they be cities, countries, states, judicial districts, circuits, provinces, cantons, or regions? On the other hand, if the enumerated places referred to High Contracting Parties the "places" referred to can be given a more stable and uniform geographical definition—the territory of the High Contracting Parties, a concept that is introduced in Article 1 of the Convention.

The United States certainly qualifies as one of the "places" enumerated in Article 28(1) and that is sufficient basis for denying defendant's motion to dismiss for lack of subject matter jurisdiction; the domicile of the carrier, its principal place of business, and its place of business where the contract was made are all within the United States. Nothing we have said precludes a defendant, even if the Warsaw Convention is applicable, from objecting to venue, under 28 U. S. C. §1391, or moving for a transfer under 28 U. S. C. §1406(a), or from making similar maneuvers in the state systems. But in such an instance the choice of forum will be governed by the internal rules of the High Contracting Party, not the Warsaw Convention. Judge Wyatt, in passing on defendant's motion, did not consider whether the proper venue of this action was the

Southern District under §1391, or whether defendant was entitled to a transfer under §1406(a). Defendant did not object to venue or move to transfer and its time for doing so had long passed; defendant answered in May 1959, and moved to dismiss almost four years later, in February 1963. Moreover, nothing we have said should be interpreted as passing on the question whether a defendant would be entitled to a dismissal for lack of subject matter jurisdiction, a right that could be asserted by a party or the court at any stage of a proceeding, see, e.g., Rule 12(h), Federal Rules of Civil Procedure, if the United States is not one of four enumerated "places" or Article 28(1) (see, e.g., McKenry, *supra*, at 225 n. 68. Compare, e.g., *Mason* v. *British Overseas Airways Corp.*, 1961 U. S. Av. R. 617 (S. D. N. Y. 1956) (treating Article 28(1) as relating to "venue") with, e.g., *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E. D. Pa. 1962) and *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Av. R. 651 (N. D. Ill. 1961) (treating Article 28(1) as relating to "jurisdiction").

II. Limitation on Liability

After Judge Wyatt denied defendant's motion to dismiss, and declined to make the ruling that would have enabled defendant to appeal the interlocutory order at once, 28 U. S. C. §1292(b), the case proceeded to trial before Judge Palmieri and a jury. The jury returned a verdict for plaintiffs, but limited the damage award to the maximum provided by the Warsaw Convention.

The Warsaw Convention controlled the question whether defendant could be liable for damages resulting for the death from the crash of its aircraft (Article 17) and it

also determined the standard of conduct. Liability would attach unless defendant proved either that it took all necessary measures to avoid the accident or that it was impossible to take such measures (Articles 17 and 20). The jury found that defendant failed to prove this.

Plaintiffs' primary concern was to avoid the limitation of damages imposed by Article 22 of the Convention. Plaintiffs argued that the carrier was precluded from availing itself of the Convention's limitation on liability because,[2] first, the accident was caused by the "wilful misconduct" of the carrier (Article 25), secondly, the passenger ticket was never delivered to decedent (Article 3(2)), and thirdly, even if the ticket was in fact delivered to decedent, it was never *adequately* delivered to him as required by Article 3(2).[3] The jury decided that plaintiffs had failed to prove that there was "wilful misconduct" on the part of the carrier and that plaintiffs had failed to prove that no ticket was ever delivered to the decedent. The damage award was therefore confined to the limitation of the Warsaw Convention. We are of the opinion, however, that as a matter of law the delivery of the ticket was not adequate and that the limitation on damages of the Convention is inapplicable.

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[2] Plaintiffs also argued that the limitation of liability of the Convention was inapplicable because this was a military charter flight and hence "performed by the United States." The full thrust of the argument could only be that the Convention as a whole is inapplicable to this flight, an argument that was disposed of previously, *supra* p. 1146, and one that is inconsistent with plaintiffs' use of the standard of liability established by the Convention.

[3] Article 3(2): "The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Appendix B

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, for example, could consist of deciding not to take the flight, entering a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that "the carrier and passenger may agree to a higher limit of liability" (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures. The delivery requirement of Article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air. The specific language of Article 3(2), making the limitation on liability unavailable "if the carrier *accepts a passenger* without a passenger ticket having been delivered," lends substantial support to our position. This position is not necessarily inconsistent with *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88, 97, 85 N. E. 2d 880, 885 (1949), which merely held that the limitation on liability does not depend "for its existence and validity on express assent thereto by the passenger." That case did not decide whether the ticket must be delivered in such a manner as to provide the passenger with a reasonable opportunity to take self-protective measures. Compare also *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2 Cir. 1955),

cert. denied, 350 U. S. 989 (1956), *affirming* 95 F. Supp. 756 (S. D. N. Y. 1950).

Whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures depends in each case on the particular factual circumstances. It is a test that is to be applied by the jury on the evidence before it. We are of the opinion, however, that a jury could not have reasonably found that the delivery of the ticket to the decedent, Lieutenant Mertens, was adequate and we therefore hold as a matter of law that the delivery was inadequate and that the limitation of liability of the Warsaw Convention is inapplicable.

The testimony of defendant's own ticket dispatcher at the Base was the only evidence presented on the question of delivery, as the crew and the other passenger on the plane were killed. The ticket dispatcher testified that the ticket was delivered to Lieutenant Mertens only after he had boarded the plane; that the material Lieutenant Mertens was accompanying under military orders was already loaded on the plane; and that, at the time of delivery, the aircraft was parked on the ramp about ready to take off. We also base our conclusion on the fact that presumably Lieutenant Mertens would have disobeyed orders if he left the material unaccompanied by disembarking after receiving the ticket to, for example, obtain flight insurance; and that the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off. Under all these circumstances it could not be said that Lieutenant Mertens had a reasonable opportunity to take any measures to protect himself against the limitation of

liability, regardless of the fact that the measures available to him might have been circumscribed because he was a military courier.

We therefore vacate the judgment below, which was based on the view that the limitation of liability of the Warsaw Convention is applicable and awarded plaintiffs the Convention's maximum, $8,291.87. On remand it is only necessary to have a new trial on the issue of the amount of damages. Judge Palmieri wisely submitted this case to the jury on the basis of special interrogatories, Rule 49(b), Federal Rules of Civil Procedure, and there is no reason why the jury's answers to the interrogatories establishing defendant's liability should be disturbed. The error of law we find relates only to the amount of damages, and there is no basis for believing that this error infected any other aspect of the jury's verdict. If any assessment of defendant's culpability is necessary to determine the amount of damages under the applicable law, see *infra* p. 1156, the jury's answers to certain other interrogatories should be sufficient. The jury specifically found that defendant had failed to take all necessary measures to avoid the accident and that it was not impossible to take such measures, but that this dereliction did not amount to wilful misconduct.

Nothing in this opinion should be interpreted as necessarily implying that because the limitation of damages of the Convention is inapplicable, there can be no limitation upon the damages plaintiffs may be entitled to. Conceivably a concerned jurisdiction might, quite independently of the Convention, impose a limitation on the amount of damages recoverable for a wrongful death; and then the question would have to be faced whether the limitation on damages by the Convention is the exclusive limitation on

damages for death caused by the crash of an aircraft during a flight covered by the Convention. *Cf Ass'n of the Bar* of The City of N. Y., *The Warsaw Convention as Amended by the Hague Protocol,* 26 J. Air L. & Com. 255, 261 (1959). However, apparently none of the jurisdictions[4] that might possibly be concerned with this issue have rules limiting the amount of recovery, and there is thus no need to resolve that question now. Nor is there any need to determine which law governs if a conflict developed, compare *Pearson* v. *Northeast Airlines, Inc.,* 309 F. 2d 553 (2 Cir. 1962), *cert. denied,* 372 U. S. 912 (1963). But seemingly some choice of law must be made regarding the issue as to which items of damage can be properly included in the award, for example, whether Lieutenant Mertens' parents could recover for their mental pain and anguish as well as their pecuniary loss. It seems clear that the Warsaw Convention left this issue, as it did other issues, such as who are the proper beneficiaries of a damage award, to the internal law of the parties to the Convention, see *Komlos* v. *Compagnie Nationale Air France,* 209 F. 2d 436 (2 Cir. 1953), *cert. denied,* 348 U. S. 819 (1954), *affirming* 111 F. Supp. 401 (S. D. N. Y. 1953). The parties and district court below have uncritically assumed, in accordance with the systematics of the first *Restatement on Conflict of Laws* that this issue is to be controlled by the law of the place of accident (Japan), *ibid.* without passing judgment on this issue, since it will presumably be reconsidered on remand, it will suffice to note that under *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941), the federal diversity court below is to follow the New York rules on conflict

[4] Japan (the place of the accident), California (the place of departure and apparently where decedent was stationed), and New Jersey (apparently decedent's non-military domicile, his parents' domicile, and the state of administration).

of laws,[5] and that *Babcock* v. *Jackson*, 12 N. Y. 2d 473, 191 N. E. 2d 279, 240 N. Y. S. 2d 743 (1963), has ushered in a new regime for conflict of laws for New York, at least. Under this new mode of analysis it might well turn out that the law of the jurisdiction where the aircraft crashed should not govern the issue as to which items or types of damage could be recovered by plaintiffs.

The order denying defendant's motion to dismiss is affirmed, the judgment below is vacated, and the case is remanded for a new trial on the issue of damages.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of February one thousand nine hundred and sixty-five.

Present: Hon. J. Edward Lumbard, *Chief Judge,*
Hon. Paul R. Hays,
Hon. Thurgood Marshall, *Circuit Judges.*

Frederic T. Mertens, Sr., individually and as Administrator of the Estate of Frederic Thorn Mertens, deceased, and Margaret S. Mertens,

Plaintiff-Appellants,

—v.—

The Flying Tiger Line, Inc.,

Defendant-Appellant.

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[5] There is no indication that the Warsaw Convention sought to establish its own uniform conflict-of-laws rule on this issue.

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order denying motion to dismiss of said District Court be and it hereby is affirmed.

It is further ordered, adjudged and decreed that the judgment of said District Court be and it hereby is vacated and that the action be and it hereby is remanded for a new trial on the issue of damages in accordance with the opinion of this court with costs to plaintiffs-appellants.

A. DANIEL FUSARO
Clerk

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 146-108

FREDERIC T. MERTENS, SR., individually and as Administrator of the Estate of Frederic Thorn Mertens, deceased, and MARGARET S. MERTENS,

Plaintiffs,

—against—

THE FLYING TIGER LINE, INC.,

Defendant.

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PALMIERI, *J.*

This is a motion by plaintiffs for a new trial.

The plaintiffs sued to recover for the wrongful death of their son, Lieutenant Frederic Thorn Mertens, a passenger on a plane operated by the defendant airline under charter to the United States Government. The plane was on a trip from California to Japan, by way of Honolulu and Wake Island, and had its last fuel stop and change of crew at Wake Island. On September 9, 1958, as it was nearing its destination near Tokyo, it crashed into a mountain, resulting in the destruction of the plane and the death of all those aboard, including Lieutenant Mertens.

The case was tried to a jury which, by way of answers to special interrogatories,[1] awarded plaintiffs the maximum recovery allowable under the Warsaw Convention,[2]

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namely, $8,291.87. A judgment in plaintiffs' favor was entered in this amount. The trial, which began on October 11th, ended on October 16, 1963.

The fatal flight which was the subject of this litigation was an international flight pursuant to the terms of the Warsaw Convention. The uncontroverted facts, the allegations of the complaint, the pre-trial order, and the prior agreement of the parties,[3] made this a basic element of the case.

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[1] The interrogatories and the answers of the jury are reproduced herewith as an appendix.

[2] Presidential Proclamation of October 29, 1934, 49 Stat. Pt. 2 at p. 3000 *et seq.*, Article 22, subdivisions (1) and (4).

[3] In an opinion filed on June 3, 1963, dealing with a jurisdictional motion, Judge Wyatt of this Court said: "The parties are in agreement that the Warsaw Convention is here applicable."

Appendix B

The trial strategy of the plaintiffs was to avoid the limitations of damages contained in the Warsaw Convention by seeking to prove, within the terms of two express exceptions set forth in the Convention, that the defendant was guilty of "wilful misconduct" [4] and that there had been no delivery of a ticket to the deceased.[5]

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These issues were vigorously litigated and submitted to the jury in separate interrogatories.[6] The jury's answers were adverse to the plaintiffs' contentions, thereby leaving plaintiffs with the damages awarded which were fixed at the highest amount allowable under the Warsaw Convention.

The matters sought to be raised on this motion were either the subject of precise rulings at the trial, with respect to which the plaintiffs have not, in my opinion, been able to establish any basis for their claims of error; or they were not appropriately raised.

The interruption by the Court of plaintiffs' counsel on summation occurred when plaintiffs' counsel made the following statement:

> Now, if he didn't get the proper briefing—and we say it is up to them to show they complied with this rule—then we will ask you to find that there was a wilful and deliberate default, and whether you call it gross negligence or whether you call it wilful fault, it really means a lack of due care, that under these circumstances you could foresee that an accident would happen. (Transcript at p. 362.)

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[4] Article 25, subdivision (1), Warsaw Convention.

[5] Article 3, Section 2, Warsaw Convention.

[6] See Appendix, Interrogatories 3 and 4.

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This argument, which without warrant, brought the term "negligence" into the case, confused negligence with the concept of wilful misconduct, and was plain error. See *Grey* v. *American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955) and cases there cited. Besides, in seeking to explain the law to the jury, it was an invasion of the Court's function.

The plaintiffs' assertion of error on the ground that they did not have the defendant's flight operations manual at the trial was a result of their failure to use pre-trial procedures for obtaining its disclosure in good time. This case was pending for a number of years and there had been ample opportunity to produce it,[7] if, indeed, it was as significant as the plaintiffs now claim it was. The dragnet type of subpoena served by the plaintiffs on the eve of trial was not an adequate means of imposing the heavy burden on the defendant of producing this manual as it

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existed on the date of the accident.[8] This manual is a voluminous loose-leaf book, containing many rules and regulations, subject to continuous change and requiring the constant addition and removal of pages.[9] It presented a considerable problem for court production purposes inasmuch as its precise text as of the date of the accident had to be reconstituted. It is worth noting that the pre-trial order is silent with respect to it although a number of other proposed exhibits are mentioned.

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[7] The complaint was filed on May 12, 1959. In a note of issue filed on May 6, 1960, the plaintiffs stated: "The parties have taken, or have had reasonable opportunity to take and complete, necessary depositions and other discovery proceedings."

[8] See Transcript pp. 334-35, 488-89.

[9] See Transcript pp. 130-31, 184, 274.

Moreover, the plaintiffs had available, but chose not to call, an expert who could have testified with respect to the effective regulations so far as they were relevant at the time of the operation of the plane in question.[10] If the

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plaintiffs were left only with the testimony of Captain Pinke, defendant's director of flight operations, this was the necessary result of their own trial tactics and they cannot now be heard to complain.

The plaintiffs point to no authority to justify the contention that delivery of the ticket made on board the plane was insufficient; nor have they cited any authority to sustain their assertion that the ticket required the name of the deceased to be on it. Indeed, the Warsaw Convention provides, in Article 3 thereof, the various particulars which a ticket should contain, and the passenger's name is not one of them. Moreover, the same Article provides that "the absence, irregularity, or loss of the passenger ticket" does not affect the existence or the validity of "the contract of carriage, which shall none the less be subject to the rules of this convention." With respect to the plaintiffs' contention that the defendant had the burden of proof on the issue of the delivery of the ticket to the deceased passenger, the plaintiffs have cited no authority in support of this position. In *Grey* v. *American Airlines, supra,* at p. 285, it was expressly held that the plaintiffs had the

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burden of proof with respect to wilful misconduct of the carrier. There appears to be no valid reason why the bur-

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[10] See Transcript pp. 340-41, 343-44. Plaintiffs' counsel introduced the proposed expert to the Court, stating he was present to refute defendant's witness Pinke. He was not called, according to plaintiffs' counsel, because of "qualms about the ethics of it" and because "this was a question of law."

den of proof under the comparable exception to the damage limitation clause, dealing with ticket delivery, should be different.

Lastly, plaintiffs' claim of error with respect to the summation of defense counsel regarding a fellow passenger, Petty Officer Therwanger, is not based upon any objection made at the trial. In any event, I have been able to find neither error nor prejudice in the argument made by defense counsel on this point.

The plaintiffs' motion for a new trial is denied.

IT IS SO ORDERED.

Dated: New York, N.Y.
December 5, 1963

/s/ EDMUND L. PALMIERI
EDMUND L. PALMIERI
U. S. D. J.

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APPENDIX

1. Have the plaintiffs proven, by a fair preponderance of the credible evidence, that Frederic Thorn Mertens died near Tokyo, Japan, on or about September 9, 1958 while travelling as a passenger in an aircraft owned, controlled and operated by the defendant Flying Tiger Lines, and its agents, on a flight from Travis Air Force Base in California?* X

YES or NO

*(The jury were instructed at the trial to answer this question in the affirmative. See Transcript p. 457).

2. Has the defendant, Flying Tiger Lines, proved by a fair preponderance of the credible evidence, that it and its agents and employees took all necessary measures to avoid the accident, or that it was impossible for defendant, its agents or employees to take such measures?** X

YES or NO

**(Contrary to the plaintiffs' assertion in their post-trial brief, there was no direction by the Court with respect to this question. However, a very strong suggestion was made to the jury that on the evidence before them they should answer the second question in the negative. See Transcript pp. 457-460).

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If your answer is YES, go no further and return a verdict for the defendant.

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3. Have the plaintiffs proven, by a fair preponderance of the credible evidence, that the accident, near Tokyo, Japan, on or about September 9, 1958, and the ensuing death of Frederic Thorn Mertens, were proximately caused by the wilful misconduct of the defendant or Captain Donahoe, the commanding pilot? X

YES or NO

4. Have the plaintiffs proven, by a fair preponderance of the credible evidence, that no ticket was ever delivered to Lt. Frederic Thorn Mertens? X

YES or NO

Note: Please answer either Question 5 or Question 6 depending upon how the previous questions were answered. See the instructions in the questions themselves.

5. If your answer to Question 1 is YES and to Question 2 is NO, and if either Question 3 or Question 4 is answered YES, then answer the following:

(a) What is the amount of pecuniary loss suffered by the plaintiffs as a result of Lt. Mertens' death? $.....

(b) What is the amount of damages awarded by you to the plaintiffs as members of Lt. Mertens' family for the mental pain and anguish suffered by them as a result of his death? $.....

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6. If your answer to Question 1 is YES and to Question 2 is NO, and if both Questions 3 and 4 are answered NO, what is the amount of damages awarded by you to the plaintiffs pursuant to the limitations of the Warsaw Convention up to but not exceeding the amount of $8,291.87? $ 8,291.87

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FREDERIC T. MERTENS, SR. as Administrator of the Estate of Frederic Thorn Mertens, deceased, Plaintiff v. THE FLYING TIGER LINE, INC., Defendant.

CIV. 146-108

The action is for wrongful death resulting from an aircraft accident in Japan in September 1958. The action was commenced in this Court on the jurisdictional basis of diversity of citizenship. 28 U.S.C.A. & 1332.

The motion is by defendant under Fed. R. Civ. P. 12(b) for judgment of dismissal for lack of jurisdiction over the subject matter; it is asserted that jurisdiction has been taken away from this Court by the Warsaw Convention, an agreement between many sovereign nations which regulates air transport, to which the United States and

Japan are parties, and the text of which may be found in 49 Statutes at Large pages 3000-3026.

The motion as made under Rule 12(b) is obviously out of time and therefore cannot be considered under that provision of the Rules. No motion under Rule 12(b) was made by defendant before pleading and no defense of lack of jurisdiction over the subject matter was asserted in the answer, filed May 29, 1959. See Fed. R. Civ. P. 12(b) and (d).

The motion will be entertained, however, as a "suggestion" by defendant of a lack of jurisdiction of the subject matter which can be made at any time under Rule 12(h).

Plaintiff is administrator of the Estate of Frederic Thorn Mertens, who boarded in California a plane operated by defendant and travelled on the plane as a passenger under a ticket (contract) issued by defendant. Decedent lost his life when the plane crashed in Japan.

The parties are in agreement that the Warsaw Convention is here applicable.

Article 28 of that Convention requires that an action

> "must be brought, at the option of the plaintiff . . . either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."

The parties are agreed that the Southern District of New York does not fit within any description of Article 28.

If the effect of that Article is to take away the ordinary diversity jurisdiction of this Court, the motion must be granted.

The question is settled to the contrary, however, by the decision of Judge Bryan in *Spencer* v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S.D.N.Y. 1962). This is the most recent decision in this District and discusses most, if not all, of the earlier precedents. Judge Bryan expressed his conclusion as follows:

> "I cannot conceive that it was the design or effect of Article 28, drafted in contemplation of adherence by many nations with widely divergent systems of jurisprudence and court structure, to deal with questions of technical subject matter jurisdiction within the framework of the federal judicial system of the United States or to impinge upon the jurisdiction conferred by Congress upon the federal courts."
>
> (201 F. Supp. at 507)

Defendant advances a number of points to demonstrate error by Judge Bryan in the *Spencer* case and by Judge McGohey in an earlier similar decision in this District. I have carefully considered defendant's points but am not persuaded by them.

Defendant has not advanced the idea of a transfer under 28 U.S.C.A. & 1406; as also pointed out by Judge Bryan in the *Spencer* case, it is too late after answer to object to venue or to move to transfer.

Motion denied.

So Ordered.

Dated: June 3, 1963

/s/ Inzer B. Wyatt,
Inzer B. Wyatt,
U. S. D. J.

Memorandum Opinion
Filed United States District Court, May 11, 1965
Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 63-1736

ROSINA DIBIASE, Individually and as Administratrix of the Estate of ANGELINA NOTTE FARINA, deceased,

Plaintiff,

—against—

ALITALIA-LINEE AEREE ITALIANE, S.p.A., DOUGLAS AIRCRAFT CO., INC., and CURTISS-WRIGHT CORPORATION,

Defendants.

Motion denied see remarks in transcript of pre-trial conference of this date. So ordered. 5/10/65

s/ Lloyd F. MacMahon
U.S.D.J.

Note: the following are the remarks in the transcript of the pre-trial conference referred to:

"The Court: Well, I think on the other point I would agree with Judge McGohey and Judge Bryan's decision in the two cases cited in your memorandum, the names of which escape me at the moment.

Memorandum Opinion

The work (*sic*—Warsaw Convention) in that particular regard does not limit the overall picture and I doubt whether if it did it would be constitutional. I think essentially it is a venue provision . . ." (Tr. 148)

" . . . it . . . in no way would impair plenary power of this court and its jurisdiction over the subject matter. So I deny your motion . . ." (Tr. 149)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

v.

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1168

THE FLYING TIGER LINE, INC.,

Petitioner,

v.

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Questions Presented

1. Is the United States District Court for the Southern District Court of New York a proper forum for this case within the contemplation of Article 28 of the Warsaw Convention?

2. Was the delivery of the airline ticket to the respondents' decedent, Frederic Thorn Mertens, improper within the meaning of Article 3 (2) of the Warsaw Convention so as to render Article 22 of the Convention inapplicable insofar as it limits the recovery of damages?

Statement

Respondent accepts petitioner's Statement (P. pp. 3 to 6) except as hereinafter modified.

The delivery of the airline ticket by an employee of petitioner was made after respondents' decedent boarded the plane, and immediately prior to flight so that no opportunity was afforded to respondents' decedent to read the provisions regarding limitation of liability printed on the reverse side of the ticket and act upon the knowledge thereby conveyed to him. Respondents' decedent was denied a reasonable opportunity to either enter into a special contract with petitioner providing for additional liability protection or secure other flight insurance protection. Delivery of the ticket was made only after the passenger door on the airplane was closed, and only a ladder at the pilot's door was a possible means of egress (C. A. appellants' brief and appendix p. 12).

Article 28 of the Warsaw Convention provides that an action for damages in the case of injury or death to a passenger must be brought in a court of one of the High Contracting Parties. In addition, the High Contracting Party must have one of the four enumerated contacts set forth in the article, to wit, the nation must be the domicile of the carrier, his principal place of business, where he has a place of business through which the contract of transportation was made or the place of destination specified for the flight.

This action was commenced on May 13, 1959, and petitioner answered the complaint on May 28, 1959. It was not until March 26, 1963, almost four years later, that petitioner moved the District Court to dismiss the complaint on the basis of improper forum. Mr. Justice Wyatt in his opinion order dismissed the motion stating "The motion as made under Rule 12(b) is obviously out of time and therefore cannot be considered under that provision of the Rules. No motion under Rule 12(b) was made by defendant be-

fore pleading and no defense of lack of jurisdiction over the subject matter was asserted in the answer, filed May 29, 1959. See Fed. R. Civ. P. 12(b) and (d)". Appendix B, p. 30a. No argument regarding personal jurisdiction or venue can now be properly raised.

Argument

Petitioner seeks review of a non-final order of the Court of Appeals for the Second Circuit. Circuit Judge Marshall remanded the action to the Southern District for New York for "a new trial on the issue of damages" (Appendix B, p. 20a). It is the general rule that the writ will be refused where there has been no final determination, and the proceedings in the lower tribunal are still pending.* No exceptional circumstances or probable irreparable injury has been shown by petitioner to remove the instant case from this prohibition.

The decision below is in accord with like decisions of the Court of Appeals for the Second Circuit. It does not conflict with the recent decisions of any other court of appeals, and is a correct application of the governing principles of law. Further review is unnecessary.

(1) *Choice of Forum.* Petitioner's argument that the law is unsettled regarding the effect of Article 28 of the Warsaw Convention as it applies to subject matter jurisdiction in United States District Courts evidences a failure to

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* *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U. S. 372 (1893);
Simkins v. *Simkins*, 271 F. 87 (CCA 5th Circuit, 1921);
Carville v. *Allen*, 214 N.Y.S. 2d 985, 13 A. D. 2d 866 (3rd Dept., 1961);
General Mut. Ins. Co. v. *Mutual Ins. Rating Bureau*, 264 N.Y.S. 2d 679, 23 Misc. 2d 991 (1960);
Public Porters Protective and Defense Ass'n of New York Inc. v. *O'Connell*, 168 N.Y.S. 2d 350, 8 Misc. 2d 1001 (1957);
Santa Clara Lumber Co. v. *Comm. of Land Office*, 204 N.Y.S. 746, 209 App. Div. 705 (3rd Dept. 1924).

properly construe the issue that was resolved in the Court below, and the settled state of the law today between the circuits on that issue.

Petitioner attempts to sustain his fallacious interpretation of Article 28 regarding the use of the term "place" by alleging that the same use of the term was made in Article 1, Paragraph (2). This is purely conclusory, and unsupported either by case law or statutory authority. In addition, "the plain meaning" of Article 1 as compared to Article 28 indicates a different use of the term "place" in Article 1 as opposed to Article 28. Article 1 uses the term in the following context:

> "(2) For the purposes of this Convention the expression 'international transportation' shall mean any transportation in which, . . . the place of departure and the place of destination . . . are situated either *within* (emphasis supplied) the territories of the two High Contracting Parties or *within* (emphasis supplied) the territory of a single High Contracting Party if there is an agreed stopping place *within* (emphasis supplied) a territory subject to the sovereignty . . . of another power, . . ." (Appendix A, pp. 3a, 4a)

The term "place", then, in Article 1 refers to a location within the territorial boundaries of one of the High Contracting Parties. If this was the intention of the drafters with reference to Article 28, as petitioner alleges, then instead of Article 28 reading:

> "(1) An action for damages must be brought . . . in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." (Appendix A, p. 5a)

it would have been drafted so as to read in part:

> "Of his principal place of business, *within the territory of a single High Contracting Party*, or where he has a place of business *within the territory of a single High Contracting Party* . . . or before the court at the place of destination *within the territory of the single High Contracting Party.*"

It is apparent, then, that petitioner's argument from analogy must fail.

The Second Circuit Court below expressly addressing itself to this issue stated:

> "Plaintiff's choice of forum within that country is governed by the internal law, with all its intricacies and complexities, not by the Warsaw Convention . . . The basic unit of international law is the nation-state and it is fair to assume, absent clear indications to the contrary, that Article 28 (1), was written with reference to nation-states, not to areas and subdivisions of nation-states." (Appendix B, p. 12a)

It is an accepted principle that the latest decision in a given circuit is deemed to be the accepted law of that circuit.

Petitioner relies upon the lower court authorities cited, and overruled by Circuit Judge Marshall (Appendix B, p. 11a, ft. nt. 1), save for the addition of one decision, *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Av. R. 651 (N. D. Ill. 1961).

The Northern District of Illinois is now in accord with the position of the Southern District of New York, as reflected by the opinion below, since *Pardonnet* v. *The Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N. D. Ill. 1964), was decided overruling *Martino* v. *Trans World Airlines, Inc.*, 1961 U. S. Ar. R. 651 (N. D. Ill. 1961), as is the Eastern District of Pennsylvania since *Pitman* v. *Pan American World Airways, Inc.*, 223 F. Supp. 887 (E. D. Pa. 1963),

overruled *Nudo* v. *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E. D. Pa. 1962).

In addition, the United States Supreme Court is not concerned with conflicts between district courts but rather conflicts between circuits and petitioner makes no showing of any present conflict of authority between circuits on this question. Finally, the United States Supreme Court is not primarily concerned about conflicts within a circuit and that fact notwithstanding there is no present conflict shown by petitioner within any Circuit Courts of Appeal.

Petitioner alleges that there are "... conflicting decisions as to whether Article 28 refers to subject matter jurisdiction or merely to venue" (P. p. 8). Petitioner further states "The Court below expressly declined to pass on the question of whether Article 28 relates to subject matter jurisdiction or merely to venue" (P. p. 9), but fails to state the obvious reason why the Court declined to make such a determination, to wit, no determination of that issue was necessary for a full and complete judicial finding. All that had to be decided was whether Article 28 referred to the nation-state unit, or to particular locations within a given nation-state (as one of the four enumerated "places").

Petitioner does not cite a single Circuit Court decision conflicting with the ruling of the Circuit Court in this case. As to the District Court and state court cases relied upon by petitioner Circuit Judge Marshall considered and disposed of them by his comment "none of which we find persuasive" (Appendix B, p. 112, ft. nt. 1).

Petitioner has obviously failed to make the necessary distinction between the use of the terms subject matter jurisdiction, and venue as used in this country and by the drafters of the Warsaw Convention. *Pardonnet* v. *The*

Flying Tiger Line, Inc., supra, drew the necessary distinction in the following language appearing on pages 686 and 687:

> ". . . it seems doubtful that the drafters of the Warsaw Convention, almost all of whom were from civil law, not common law, countries, and only a small number of whom were from countries which have a federal court system similar to that in the United States, would be concerned at all with the internal operations of the judicial system of any particular nation. Thus, it seems the better construction of Article 28 (1) of the Warsaw Convention to read each of the four situs mentioned as referring only to the nation in which the suit may be brought but not to a particular court within a nation . . .
>
> Further support of this 'national' interpretation of Article 28 of the Convention is found in subsection (2) of that Article, which states that: 'Questions of procedure shall be governed by the law of the court to which the case is submitted[;] . . . questions of procedure, such as . . . where within the territory of one of the high contracting parties the court in which the suit is filed should be located . . .'"

Spencer v. *Northwest Orient Airlines, Inc.*, 201 F. Supp. 504 (S.D.N.Y. 1962), indicates the obvious fallacy of petitioner's reliance upon Article 32 of the Convention reference to jurisdiction. At page 506, the Court stated:

> "For the use of the term 'jurisdiction' in an international convention drawn by representatives of nations with widely divergent systems of jurisprudence can scarcely be construed to refer to the concept of subject matter jurisdiction *as used in the federal judical system of the United States.*" (emphasis supplied)

The Court further stated at page 507:

> "It is unnecessary here to decide . . . the question of whether or not venue was properly laid in this district; . . . defendant by serving its answer has waived its right to object to venue or to move for transfer on the ground of improper venue under 28 U.S.C. § 1406."

As already indicated, that is the precise situation in the instant case.

In *Khan* v. *Compagnie Nationale Air France,* 9 CCH Avi. 17,107 (S.D.N.Y. 1964), the Court stated that:

> ". . . Article 28 cannot dictate where, within the territory of one of the parties, suit must be brought . . ." (p. 17,107)

Rotterdamsche Bank v. *British Overseas Airways Corp.,* 1953 U. S. Av. R. 163 (1953), 1 Lloyd's List Law Reports 154 and *Brown* v. *Compagnie Nationale Air France,* 8 CCH Avi. 17,272 (S.D.N.Y. 1962), clearly refers to jurisdiction in the same terms.

(2) *Limitation of Liability.* The petition completely misconstrues the holding of the court below insofar as it relieves respondent from the limitation of monetary liability provided for by the Warsaw Convention. Neither the arguments presented, nor the case law cited are relevant to the Circuit Court's decision in this regard. Respondent agrees with the petitioner's assertion that:

> "The application of the limitations of liability contained in the Warsaw Convention does not depend upon . . . contractual agreement . . ." (P. p. 11)

Both *Grey* v. *American Airlines, Inc.,* 95 F. Supp. 756 (S.D.N.Y. 1950), aff'd 227 F. 2d 282 (2d Cir. 1955) and the opinion below (35 F.R.D. 196 (1963)), consider the subject of limitation of liability strictly in terms of the Con-

vention. The holding below stands for the proposition that the Convention's limitation on liability is predicated upon proper delivery of the airline ticket pursuant to Article 3. *Grey* v. *American Airlines, Inc., supra,* is not opposed to that finding. It is necessary also to indicate that the *Grey* case in no way involved an interpretation of the last sentence of of Article 3 (2) which reads:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." (Appendix A, p. 52)

It is this precise provision that the Court below had to interpret in reaching its decision.

Ross v. *Pan American Airways, Inc.,* 299 N. Y. 88, 85 N. E. 2d 880 (1949), although involved with delivery of the airline ticket did not present the same issue of law as was resolved in the opinion below. In the *Ross* case the issue was one of agency, to wit, whether the passenger-plaintiff "impliedly, if not expressly, ratified and adopted what had been done by the Army, and later by Abraham, in taking out . . . [an airline] ticket in her name" (299 N. Y. at p. 96). There was no issue, then, as to whether or not the airline had fulfilled the prerequisite of adequate delivery of the ticket in advance of flight.

The unsupported comment of the petition that "The decision below, in holding that 'the ticket must be delivered to the passenger in a manner as to afford him a reasonable opportunity to protect himself against the limitation of liability' imposed by law . . . is completely at variance with the clear language of the Convention, and in conflict with *Seth, supra*" (P. p. 12) is patently spurious.

Seth v. *British Overseas Airways Corp.,* 329 F. 2d 302 (1st Cir. 1964), *cert. denied,* 13 L. Ed. 2d 61 (1964), was concerned with interpretations of entirely different arti-

cles of the Convention, to wit Article 18 (1) (2), Article 30 (3), and most particularly, Article 4 (3) (h). Plaintiff in *Seth* sought recovery for the *loss of baggage* by BOAC Airlines. Plaintiff sought to avoid the limitation as to damages relating to the loss of baggage under the Warsaw Convention. The action, however, was similar to the case at bar in that the airline ticket did not state the *amount* of the limitation of liability. The Court disposed of this issue by stating at page 307:

> "The ticket does not leave the passenger in the dark as to a hidden risk he might not appreciate. It gives him fair warning of the existence of limitations on the carrier's liability which he can avoid only on showing that the carriage undertaken by the carrier is not 'international carriage' as defined in the Warsaw Convention. This gives the passenger a blunt warning to find out the nature of his carriage and if covered by the Warsaw Convention to declare excess value and pay the price for increased liability in the event his baggage is lost. We think this constitutes compliance with sub-paragraph (h) of Article 4 of the Warsaw Convention."

If petitioner cites this case as to argue by analogy, he must then admit that the purpose of Article 4 (3) sub-paragraph (h) was to provide sufficient notice to a passenger so as to at least put him on inquiry concerning the limitations of liability. Such an inquiry would, *if delivery was timely,* afford the passenger an opportunity to obtain additional insurance if he so desired. Nothing less can be considered the purpose of Article 3 (2) relating to the requirements of notice for international transportation of persons. Admitting this, it becomes obvious that the time and circumstance of delivery of the airline ticket becomes of paramount concern, and since delivery in the instant case did not afford adequate notice, the limitation of

liability under the Convention in the case at bar is inapplicable.

It is apparent that petitioner fails to understand the distinction between being advised of the existence of a limitation of liability so as to be put on inquiry as to the extent thereof and the necessity of being informed on the ticket itself as to the exact monetary amount of the limitation. Respondent has no argument with the fact that there is nothing in the Convention which requires a precise specification as to the monetary amount of limitation to be set forth on the ticket but, once again, it must be noted that this is not the issue we are here concerned with.

Petitioner, again, misconstrues the plain meaning of the decision below when he states that it was ". . . based upon an assumption that the statement on the back of the ticket that the carriage is subject to the rules relating to liability established by the Warsaw Convention was virtually unnoticeable and unreadable" (P. p. 12). This was not in issue.

The petition continues its pursuit of not existent issues:

> "The decision below, in holding that 'the ticket must be delivered to the passenger in a manner as to afford him a reasonable opportunity to protect himself against the limitation of liability' . . . would require that the conditions be printed in a language the passenger could read, if he were literate." (P. p. 12)

Would petitioner have us deprive the vast majority of literate passengers of the opportunity to be advised that liability is limited simply because a small minority would be unable to read their ticket? Carrying this attitude of petitioner to its ultimate conclusion, one would cease the publication of any written matter because a minority are unable to read. Of course, this line of reasoning is patently absurd.

The finding of the Court below is both in accord with the uncontroverted facts and in no way at variance with the cases cited by the petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CLARENCE FRIED,
Attorney for Respondent.

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IN THE

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OCTOBER TERM, 1965

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

—v.—

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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November 5, 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 142

THE FLYING TIGER LINE, INC.,

Petitioner,

—v.—

FREDERIC T. MERTENS, SR., Individually and as Administrator of the Estate of FREDERIC THORN MERTENS, deceased, and MARGARET S. MERTENS,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its Order of October 11, 1965, denying the Petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the Petition filed May 14, 1965, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. The Court below, in its decision holding as a matter of law that the delivery of the passenger ticket in this case was inadequate within the meaning of Article 3(2) of the Warsaw Convention, found facts not based upon any evidence of record, and thereby usurped the function of the

jury in this case. By so doing, the Court below has deprived defendant of its right to a jury trial on this issue.

In its opinion, the Court below first construed Article 3(2) of the Warsaw Convention to "require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability." 341 F. 2d 851 at 856. The Court then held that the question of whether a ticket was delivered to a passenger in such manner "depends in each case on the particular factual circumstances. *It is a test that is to be applied by the jury on the evidence before it.*" 341 F. 2d 851 at 857. (Emphasis added) Finally, the Court concluded that a jury could not have reasonably found that the delivery of the ticket to plaintiffs' decedent was adequate, and therefore held as a matter of law that the delivery was inadequate and that the limitation of liability was inapplicable.

This conclusion of the Court below was based upon facts which it found, which had not been found by the jury and which, in any event, were no part of the evidentiary record in the District Court.

The Court of Appeals is not a fact-finding tribunal, and must be controlled in its decision solely by the facts contained in the record in the District Court. See, *Henneford* v. *Northern Pacific Ry. Co.*, 306 U. S. 17 (1938); *Brotherhood of Locomotive Firemen and Enginemen* v. *Northern Pacific Ry. Co.*, 274 F. 2d 641, 643 (8th Cir. 1960); *Holliday* v. *United States*, 244 F. 2d 801 at 802 (9th Cir. 1957); *United States* v. *Van Dusen*, 78 F. 2d 121 (8th Cir. 1935).

The specific facts found by the Court below in support of its decision and which are not based upon any evidence of record in this case, are set forth in the following excerpt from its opinion:

> "We also base our conclusion on the fact that presumably Lieutenant Mertens would have disobeyed orders if he left the material unaccompanied by disembarking after receiving the ticket to, for example, obtain flight insurance; and that the statement concerning the limitation of liability was printed in such a manner as to virtually be both unnoticeable and unreadable, especially in an aircraft about to take off. Under all these circumstances it could not be said that Lieutenant Mertens had a reasonable opportunity to take any measures to protect himself against the limitation of liability, regardless of the fact that the measures available to him might have been circumscribed because he was a military courier." 341 F. 2d 851 at 857.

There was no evidence whatsoever in this case that plaintiffs' decedent would have disobeyed orders, had he left the aircraft, after having received his passenger ticket, for any purpose, including the purchase of any insurance. The only testimony in this area was taken by the District Court in the absence of the jury, and the uncontroverted testimony was that plaintiffs' decedent could have disembarked to purchase insurance after having received his ticket, had he chosen to do so.

No evidence of any nature was introduced in the District Court relating to the noticeability or readability of the statement concerning the limitation of liability printed on the passenger ticket delivered to plaintiffs' decedent. A substantially identical document was received in evidence in the District Court, without objection, as plaintiffs' Exhibit 10. The statement in this Exhibit concerning the limitation of liability was clearly noticeable and readable, and the gratuitous comments of the Court below

in its opinion were based upon the appearance of a very poor photocopy printed in the Appendix used on the appeal. The writer of the opinion of the Court below declined an opportunity to examine the original Exhibit when offered at the oral argument.

In any event, the "facts" upon the basis of which the Court below concluded that the delivery of the ticket was inadequate as a matter of law, were newly found by the Court below, and in important respects were contrary to the only evidence of record relating to the same subject. By so doing, the Court below has deprived Petitioner of its right to a jury trial on the question of whether the ticket was delivered to plaintiffs' decedent in such a manner as to afford him a reasonable opportunity to take self-protective measures, *the very question which the Court below holds must be decided by the jury on the evidence before it.*

2. In holding that the jury could not have reasonably found that the delivery of the ticket to plaintiffs' decedent was adequate, the Court below has in effect granted a judgment notwithstanding the verdict on this issue, even though plaintiffs made no motion, pursuant to Rule 50(b), for such relief. Plaintiffs' only post-trial motion was pursuant to Rule 59 for a new trial.

Where a party fails to move in the District Court for a judgment notwithstanding the verdict, the Court of Appeals is precluded from the entry of a judgment notwithstanding the verdict, the maximum relief on appeal being the grant of a new trial. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Quinby* v. *Morrow*, 340 F. 2d 584 (2d Cir. 1965); *Tri-State Ins. Co.* v. *United States*, 340 F. 2d 542 (8th Cir. 1965).

The District Court treated the issue of the adequacy of the ticket delivery as a question of law to be decided by the District Court. The only question of fact decided by the jury in this regard was whether any ticket at all was delivered. The jury answered this question affirmatively, and the District Court held the delivery to be adequate.

On appeal, however, the Court below has ruled that the adequacy of the ticket delivery is for the jury to decide upon the basis of all the circumstances. In this case, however, all of the circumstances were not before the jury because the District Court treated this issue as a question of law. Nevertheless, the Court below has proceeded to find its own facts, the more important of which (at least to the Court of Appeals) are not based on any part of the record in the District Court. Having found its own facts, the Court below next concluded that, under those facts, no jury could reasonably find that the delivery was adequate. Consequently, the Court below held as a matter of law that the delivery was inadequate.

In this manner, the Court below has assumed the role of fact-finder, has gone outside the record to find facts which it assumes would be required to be found by a jury on a trial, and has necessarily, but erroneously, concluded that there would be no evidence to contradict the findings of the Court below.

The procedure followed by the Court below in reaching its decision that the ticket delivery was inadequate is so far removed from the accepted and usual course of judicial proceedings that this Court should intervene and exercise its power of supervision.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/ Austin P. Magner, Esq.

/s/ George N. Tompkins, Jr., Esq.
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court, specifically, other substantial grounds available to petitioner although not previously presented.

/s/ George N. Tompkins, Jr.

Certificate of Service

I hereby certify that I have served a copy of the foregoing Petition for Rehearing upon counsel for respondents by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to Clarence Fried, Esq., counsel for respondents, 67 Wall Street, New York, New York 10005, this 4th day of November, 1965.

/s/ George N. Tompkins, Jr.

END